

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL JAMES HIBBERD,
Appellant.

No. 36969-9-II

UNPUBLISHED OPINION

Van Deren, C.J. — Michael James Hibberd appeals a Cowlitz County Superior Court order denying his CrR 7.8 motion to modify his sentence. He contends that the sentence violates *Blakely*¹ and his Sixth Amendment² right to a jury trial because the combined total of his prison term and term of community custody exceeds his standard range sentence. We vacate the trial court's denial of Hibberd's motion, dismiss the appeal, and convert the matter for consideration as a personal restraint petition (PRP). Accordingly, we deny Hibberd's PRP.

¹ *Blakely v. Washington*, 542 U.S. 296, 301-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

² U.S. Const. amend VI.

FACTS

On December 21, 2004, a jury convicted Hibberd of three counts of second degree child molestation³ in Cowlitz County Superior Court. He appealed his convictions on various grounds but we affirmed. Following appeal, Hibberd was resentenced on December 18, 2006. Hibberd's standard range for each count was between 57 and 75 months and the trial court imposed a sentence of 72 months for each count, to be served concurrently, followed by 36 to 48 months of community custody.

On October 4, 2007, Hibberd filed a pro se CrR 7.8 motion to modify the judgment and sentence. In this motion, he argued that community custody constitutes the same restrictions as total confinement and that his sentence exceeded his standard range sentence of 75 months when considered in combination with the community custody.

The motion was noted to be heard on October 18, 2007. In a letter to Hibberd dated October 11, 2007, the trial court wrote, "Pursuant to CrR 7.8(c)(2) the motion is denied without a hearing. The affidavit/motion does not establish grounds for relief." Clerk's Papers (CP) at 41. The State filed a response to Hibberd's motion and the trial court subsequently held a hearing on October 18. The clerk's minutes reflect that the State's counsel was present, but not whether counsel for Hibberd attended, and state, "C[ou]rt already denied motion." CP at 119.

ANALYSIS

I. Show Cause Hearing under CrR 7.8(c)

Hibberd contends that the trial court erred by denying his motion to modify the judgment and sentence before holding a show cause hearing under CrR 7.8(c). He also argues that the trial

³ RCW 9A.44.086.

court erred by denying the motion without a hearing because he made a substantial showing entitling him to relief. The State concedes that the trial court erred by failing to rely on the recently enacted CrR 7.8 amendments and to transfer the motion to the court of appeals as a PRP. We agree with the State's concession.

RCW 10.73.090 generally imposes a one year limit for collateral attack on a judgment and sentence in criminal cases. We review legal questions de novo. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). We review a trial court's CrR 7.8 ruling for an abuse of discretion. *State v. Larranaga*, 126 Wn. App. 505, 509, 108 P.3d 833 (2005). A trial court abuses its discretion when it bases its decisions on untenable or unreasonable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

Former CrR 7.8(c) (1986) allowed the superior court three options in these circumstances, one of which was to "deny a CrR 7.8 motion without a hearing if the alleged facts did not establish grounds for relief." *State v. Smith*, 144 Wn. App. 860, 862, 184 P.3d 666 (2008); CrR 7.8(c). Shortly before Hibberd filed his motion, CrR 7.8(c)⁴ was amended on September 1, 2007 to read:

(1) *Motion*. Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

⁴ According to comments by the 2007 amendment's drafters:

The suggested rule will require the superior court to transfer all motions directly to the Court of Appeals for initial disposition as personal restraint petitions. Excepted are motions not barred by RCW 10.73.090 if either (1) the defendant makes a substantial showing that he or she is entitled to relief or (2) resolution of the motion requires a factual hearing. *These situations are appropriately addressed by the superior court*. In all other cases, once transferred, the more flexible procedures for initial consideration of a personal restraint petition will apply.

4A Karl B. Tegland, *Washington Practice: Rules Practice CrR 7.8* author's comts. at 542 (7th ed. 2008) (emphasis added).

(2) *Transfer to Court of Appeals.* The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

(3) *Order to Show Cause.* If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

Here, Hibberd's claims do not pose any issue requiring that the trial court resolve a factual matter. Rather, this case involves a legal issue regarding his sentence and remand would waste scarce judicial resources. We can affirm the trial court's resolution of a matter on any basis supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Accordingly, we review the merits of Hibberd's claim, treating it as a PRP, since it should have been transferred directly to the court of appeals for such consideration under the amended rule.⁵

II. Sentence

Hibberd argues that the trial court violated his constitutional right to a jury trial in violation of *Blakely* when it imposed a sentence in excess of the standard range maximum. According to Hibberd, community custody counts as imprisonment under a *Blakely* analysis, so the trial court exceeded the standard range maximum of 75 months by imposing 72 months for each count, to run concurrently, and an additional 36 to 48 months of community custody. We disagree.

We reject the argument that the top of the standard sentence range is the statutory maximum sentence for purposes of determining whether the combined terms of confinement and community custody exceed that maximum. The statutory maximum sentence, for that purpose, is

⁵ Unlike *Smith*, we conclude here that judicial economy requires our review of Hibberd's arguments as a PRP. 144 Wn. App. at 862-64.

the statutory maximum sentence defined in chapter 9A.20 RCW. RCW 9.94A.505(5); *State v. Vant*, 145 Wn. App. 592, 605, 186 P.3d 1149 (2008); *State v. Thompson*, 143 Wn. App. 861, 871, 181 P.3d 858, *review denied*, 164 Wn.2d 1035 (2008). What the Sixth Amendment and *Blakely* require is that a jury decides any fact, other than a prior conviction, that increases the penalty for a crime beyond the “prescribed statutory maximum.” 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). The “statutory maximum” is the “maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” *Blakely*, 542 U.S. at 303.

Hibberd’s conviction, without additional findings, supports the imposition of his standard range sentence plus community custody of 36 to 48 months. RCW 9.94A.715; WAC 437-20-010. Second degree child molestation is a class B felony. RCW 9A.44.086(2). The maximum allowable sentence for a class B felony is 120 months. RCW 9A.20.021(1)(b). Sentences for such offenses after July 1, 2000, include community custody within the range established by RCW 9.94A.850 or up to the period of earned early release. RCW 9.94A.715. Because second degree child molestation is a sex offense, the applicable community custody range in this case is between 36 and 48 months. *See* RCW 9.94A.030(46)(a)(i); RCW 9A.44.086; WAC 437-20-010.

The trial court found no additional facts in imposing the term of community custody, so it did not violate *Blakely*. As long as the combined terms of Hibberd’s confinement and community custody do not exceed the statutory maximum sentence for second degree child molestation, his sentence does not violate *Blakely*. *Vant*, 145 Wn. App. at 605-06; *Thompson*, 143 Wn. App. at 871. His combined terms of confinement and community custody, 108 to 120 months, do not exceed that statutory maximum sentence. Therefore, we hold that the trial court did not err by

No. 36969-9-II

imposing a sentence of 72 months for each count, to be served concurrently, followed by 36 to 48 months of community custody and Hibberd's claim for relief fails.

We vacate the trial court's denial of the defendant's motion and dismiss his appeal.

Having converted the matter for consideration as a PRP, we deny Hibberd's PRP.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Quinn-Brintall, J.

Penoyar, J.